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IN THE

Supreme Court of the United States

October Term, 1948

No. ~~797~~ 73

MEYER P. GROSS, SAUL FRANKEL, MURRAY M. SALZBURG AND MORRIS H. SNERSON, *Petitioners and Appellees Below*,

vs.

WILLIE MAY KELL, MARY JOE KELL PUTTY, MALCOM D. PUTTY, SIBYL KELL CAHOON, C. W. CAHOON, JR., BESS KELL BLAIR, WILEY BLAIR, JR., CARRIE KELL O'DONOHOE, JOHN F. O'DONOHOE, SADIE KELL BULLINGTON, ORVILLE BULLINGTON, CORINNE SHARP KELL AND MRS. LULA KELL, *Respondents and Appellants Below*

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

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WRIT OF CERTIORARI

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully show to this Honorable Court as follows:

SUMMARY OF THE MATTER INVOLVED

This suit was brought by petitioners Meyer P. Gross and Saul Frankel in the United States District Court for the Northern District of Texas against the individual respondents, who are the heirs of Frank Kell, deceased, and against Republic National Bank of Dallas, which is the escrow agent under the written contract executed by petitioners and respondents. Petitioners Murray M. Salzburg and Morris H. Snerson intervened in the trial court. They are jointly interested in the purchase with Gross and Frankel, although they did not sign the subject contract.

Trial was to the Court without a jury and resulted in a judgment in favor of petitioners for $118,353.69. On appeal the Court of Appeals for the Fifth Circuit reversed the judgment with instructions to enter judgment for respondents.

Petitioners purchased from the Kell heirs the entire capital stock of the Missouri and Arkansas Railway Company by a contract dated November 15, 1946, and shown at pages 6-28 of the Record. The purchase price was $645,000.00, of which $400,000.00 was paid in cash upon execution of the contract. The sum of $245,000.00 was deposited in escrow with Republic National Bank of Dallas to make effective the warranties and indemnities provided for in the contract. Although the written agreement is a long and complicated document the principal provisions affecting this suit are contained in paragraphs (5) and (6).

Paragraph (5) referred to the latest balance sheet of the Missouri and Arkansas Railway Company dated September 30, 1946, and attached to the contract as Exhibit "B" (R. 24). This sheet disclosed an excess of current liabilities over current assets of $118,925.18. In paragraph (5) the parties recognized that this deficit was subject to change by subsequent discovery of assets or liabilities not shown on the statement. Since any such change affected the value of the stock purchasers agreed to indemnify sellers if the deficit was reduced. Sellers agreed to indemnify purchasers and add to the escrow fund if the deficit was increased.

One other important provision appeared in paragraph (5). Each stockholder agreed that "the proportion of such indemnity for which each stockholder shall be responsible should be that proportion which corresponds to his proportionate interest in the aggregate number of shares sold by the stockholders." (R. 14).

Because of the importance of paragraph (6) the first three subdivisions are quoted (R. 14-15):

> "Purchaser agrees to either pay or see to it that the Missouri and Arkansas Railway Company forthwith pays and satisifies the vouchers which have been issued by said Railway Company, and which are listed as current liabilities in Exhibit 'B', and when same are paid and proper evidence of their payment is presented to Stockholders' representative hereinafter named, he and Purchaser, or Purchaser's representative shall authorize the holder of the escrow fund to

reimburse Purchaser forthwith from said escrow fund, as provided in Paragraph (5) hereof.

"The above mentioned current liabilities shall in any event be paid or caused to be paid by Purchaser on or before six months from the date of this agreement and if Purchaser is entitled to any reimbursement under the terms of Paragraph (5) hereof, Stockholders agree to cause same to be made from said escrow fund forthwith after proper evidence is presented to their representatives that Purchaser is entitled to be indemnified and reimbursed, as provided in Paragraph (5) hereof.

"Should other and further liabilities now unknown and undisclosed develop or be claimed, Stockholders' representative shall be notified and if he agrees that said claims are valid and subsisting obligations against the said Missouri and Arkansas Railway arising from contracts, acts and operations, excluding joint facility operations, prior to November 15, 1946, they shall be paid or caused to be paid, and reimbursement for such payments, if any is due, shall be made in the same manner as is provided in Paragraphs (5) and (6) hereof for known and admitted liabilities, shown in Exhibit 'B' attached hereto."

The trial court admitted parol evidence which decisively established that all parties throughout the negotiations and at the time of execution of the contract intended and agreed that purchasers were to be reimbursed for the difference between the current assets shown by the balance sheet of September, 1946, and the current liabilities paid or caused to be paid by them. The trial court so found (R. 59). He further found that the somewhat unusual method

of reimbursement was adopted at the suggestion of the sellers (R. 265).

The three most important aspects of the evidence which convinced the trial court that the true agreement of the parties was that petitioners should be reimbursed for the excess of known current liabilities over known current assets as reflected by the balance sheet of September 30, 1946, were as follows:

1. The testimony of five witnesses who were present and participated in the negotiations immediately prior to execution of the written contract. *The trial court believed these witnesses.*

2. The telegram of Orville Bullington dated November 11, 1946 (R. 85). Mr. Bullington was the husband of one of the Kell heirs and the duly authorized attorney of all of the sellers. He actually conducted practically all of the negotiations leading to the sale, although the contract was signed by Willie May Kell under a formal power of attorney. The telegram in question was in response to an inquiry from petitioner Gross as to how the checks for the purchase price should be made payable. In response Mr. Bullington wired Gross as follows:

> "November 7th letter received. Make larger check payable to Miss Willie May Kell, individually and as attorney in fact for other stockholders. The remainder of the consideration for the stock can be escrowed in a Dallas bank *to guarantee payment of known and unknown current liabilities which are in excess of known and unknown current assets.*" (Italics ours)

Mr. Bullington testified that he intended to embody the telegram in the contract which he drafted. (R. 238) The telegram which was sent by Mr. Bullington and received by Mr. Gross immediately prior to the latter's departure for Dallas and which constituted the last communication between any of the parties with Mr. Bullington prior to the meeting in Dallas, is an exact statement of the petitioners' position in this lawsuit. Petitioners contend that they are entitled to reimbursement for the excess of current liabilities over current assets precisely as stated by Mr. Bullington in this telegram.

3. The response of Mr. Bullington to one of Mr. Gross' proposals during negotiations immediately prior to execution of the contract. Gross suggested that since known current liabilities exceeded the known current assets by at least $118,925.18, such sum should be at once withdrawn from the escrow fund and deposited in the account of the Railroad. Bullington did not deny that purchasers were entitled to such reimbursement. He objected because such procedure was contrary to the rules of the Interstate Commerce Commission. He pointed out that purchasers could make money by purchasing claims at a discount and obtaining reimbursement in full. Finally, he assured purchasers that there would be no delay in reimbursement once current liabilities were paid. To that end he wrote the word "forthwith" in paragraph (6) of the contract. These facts were established by the testimony of all of petitioners' witnesses (R. 88-9, 143, 172-3, 188 and 198) and were

admitted by Bullington on the witness stand (R. 239). His only qualification was that he did not recall the exact amount mentioned, although it was a large sum, and that he considered that the withdrawal and deposit were to cover other liabilities, the existence and amount of which had not even been determined (R. 230).

Based upon the above well-nigh conclusive evidence as to the real agreement of the parties (which evidence was largely corroborated by respondents' own testimony), the trial court found as a fact:

> "It was the intention of the parties to said contract that as purchasers paid or caused to be paid or satisfied current liabilities in Exhibit 'B' attached to said contract in excess of current assets in said Exhibit, purchasers were entitled to receive forthwith from the escrow fund with the Republic National Bank the difference between the current assets of $206,902.36 and the current liabilities so paid or satisfied; that said contract, considered with the understanding of the parties at the time of its execution, shows such an intention." (R. 59)

The Court of Appeals chose to disregard this evidence and finding, and by strict construction of the contract within its four corners, without consideration of any of the surrounding circumstances, concluded that petitioners could not recover except for an increase in the excess of current liabilities over current assets. Accordingly, the judgment of the trial court was reversed.

It is to review such action of the Court of Appeals that certiorari is sought.

JURISDICTIONAL STATEMENT

1. The Supreme Court has jurisdiction to review the judgment here in question under Rule 38 and Title 28, United States Code, Section 1254(1).

2. The date of the judgment of the United States Court of Appeals is January 11, 1949 (R. 277). Petition for rehearing was filed within the time as extended by the Court and was denied on February 21, 1949 (R. 298).

3. It is contended that the Supreme Court has and should exercise jurisdiction to review the judgment here because the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

QUESTION PRESENTED

The question is whether the contract sued upon (especially paragraph (5) and (6) thereof) is so free of doubt as to prevent proof of the intention of the parties by clear and convincing parol evidence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Court of Appeals by disregarding substantial portions of the contract held the same to be unambiguous. It therefore held that the trial court erred in admitting parol evidence which clearly established the true agree-

ment of the parties. In so doing the Court departed from a long established and important principle of local law, to-wit: that a doubtful written contract may be explained by parol, especially when the evidence is clear and convincing.

While this particular contract is of no general public interest, the departure by the Court of Appeals from long settled principles of contract interpretation is so marked as to justify exercise by the Court of its power of supervision.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket No. 12,337, Willie May Kell et al., appellants, v. Meyer P. Gross, Saul Frankel, et al., appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Fifth Circuit be reversed by the

Court, and for such further relief as to this Court may seem proper.

Dated this May 3, 1949.

MEYER P. CROSS, SAUL FRANKEL, MURRAY M. SALZBURG AND MORRIS H. SNERSON,

By .....

Counsel for Petitioners

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 277) is reported in 171 Fed. (2d) 715.

JURISDICTION

A complete statement of the basis and reason for exercising jurisdiction by this Court is given in the Petition for Certiorari. In the interest of brevity it is omitted here.

STATEMENT OF THE CASE

A full statement has been made in the Petition for Certiorari and is omitted for brevity.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the contract clearly and without doubt or ambiguity limited petitioners' right of reimbursement to any increase in the excess of current liabilities over current assets.

2. In holding that parol evidence, however strong and convincing, was not admissible to show the true agreement of the parties.

SUMMARY OF ARGUMENT

Petitioners say that the Court of Appeals has utterly misconstrued the subject contract. In order to hold that petitioners were entitled to reimbursement only to the extent of the increase in current liabilities over current assets the Court was obliged to ignore substantial por-

tions of the contract. Petitioners' construction of the agreement gives effect to all of its provisions.

Certainly if the contract does not compel petitioners' construction, it is at least ambiguous and doubtful in that it is susceptible of the interpretation placed upon it by both parties. The true agreement was overwhelmingly established by parol evidence and was as found by the trial court.

In refusing to consider facts, circumstances and prior negotiations of the parties by way of ascertaining the true intention and agreement of the parties the Court of Appeals departed from a long-established and important principle of local law.

ARGUMENT

Petitioners are convinced that they are entitled to reimbursement for the difference between known current assets and current liabilities paid or caused to be paid by them under the first subdivision of paragraph (6) reading as follows:

> "Purchaser agrees to either pay or see to it that the Missouri and Arkansas Railway Company forthwith pays and satisfies the vouchers which have been issued by said Railway Company, and which are listed as current liabilities in Exhibit 'B', and when same are paid and proper evidence of their payment is presented to Stockholders' representative hereinafter named, he and Purchaser, or Purchaser's representative shall authorize the holder of the escrow fund to re-

imburse Purchaser forthwith from said escrow fund, as provided in Paragraph (5) hereof." (R. 14-15).

If the final words "as provided in Paragraph (5) hereof" did not appear in the above paragraph, there could be no question but that petitioners would be entitled to reimbursement in accordance with the true agreement made between the parties.

Admittedly paragraph (5) does not entitle petitioners to reimbursement for the known deficiency reflected by Exhibit "B". That paragraph is complete within itself and provides for reimbursement of either seller or purchaser in event the amount of the known deficiency is changed by discovery of unknown assets or liabilities.

Therefore, if we attribute to the above quoted section the meaning ascribed to it by respondents and the Court of Appeals, the section adds nothing to the preceding paragraph (5). It is but a meaningless repetition of what has previously been provided.

Is it possible to construe the words "as provided in Paragraph (5) hereof" to have any other meaning? Petitioners feel that their plain and unmistakable purpose is apparent from an inspection of paragraph (5).

As has been pointed out, paragraph (5) not only provides for reimbursement to either party in event of change of the amount of the known deficit. It also limits the contribution that can be enforced against a stockholder to a sum proportionate to his respective stock interest.

It is the earnest contention of these petitioners that the words "as provided in Paragraph (5) hereof" were intended to describe the manner or mechanics of the reimbursement. In other words, petitioners believe that properly construed the words "as provided in Paragraph (5) hereof" place the same limitation on the liability of the individual stockholder with reference to reimbursement for payment of *known* liabilities that paragraph (5) placed upon the stockholder's potential liability for reimbursement for payment of *unknown* liabilities.

Such construction saves the quoted portion of paragraph (6) from destruction. It gives to it a purpose. This purpose is consistent with paragraph (5) and the other parts of the contract.

A simple example will illustrate the point:

Suppose A and B agree in paragraph 1 of a contract to go to Boston by train on July 1, 1949. In paragraph 2 they agree to go to San Francisco on August 1, 1949 "as provided in paragraph 1 hereof." Would anyone argue that since paragraph 1 did not mention San Francisco paragraph 2 is null and void and should be ignored? Is it not clear that the parties meant only that they should go also by train to San Francisco? The qualifying words relate to the manner or mechanics of performance and are not permitted to destroy the objective sought to be achieved.

Petitioners' construction of the first subdivision of paragraph (6) is further reinforced by the third subdivision of the same paragraph:

> "Should other and further liabilities now unknown and undisclosed develop or be claimed, Stockholders' representative shall be notified and if he agrees that said claims are valid and subsisting obligations against the said Missouri and Arkansas Railway arising from contracts, acts and operations, excluding joint facility operations, prior to November 15, 1946, they shall be paid or caused to be paid and reimbursement for such payments, if any is due, shall be made in the same manner as is provided in Paragraphs (5) and (6) hereof for known and admitted liabilities, shown in Exhibit 'B' attached hereto." (R. 15).

How can reimbursement for unknown and undisclosed liabilities be made "in the same manner as * * * for known and admitted liabilities, shown in Exhibit 'B' attached hereto" unless reimbursement for such known and admitted liabilities was intended? Is this not a clear statement by the parties that they considered they had already made provision for reimbursement of purchasers for payment of known liabilities shown on Exhibit "B"?

However, petitioners did not rely upon the literal language of the instrument. They plead the ambiguity of the contract and their right to introduce parol (R. 3). The trial court received almost 200 pages of parol evidence showing the circumstances and negotiations leading to the agreement (R. 68-265). Based upon this evidence the Court found that the true agreement of the parties was as contended by petitioners and that the purchasers were entitled to reimbursement for the difference between known current assets and the known current liabilities paid or caused to be paid by them (R. 59).

If, therefore, paragraph (6) is uncertain, if it is susceptible of two possible meanings, if there is any reasonable doubt as to its purport, parol evidence was properly admitted not to contradict, but to resolve the doubt and clarify the obscurity. This simple principle of law has been consistently adhered to by the appellate courts of Texas. Such decisions are in complete accord with the established law of other jurisdictions, including the very forum which decided this case. It is the disregard of fundamental legal doctrine which produced the grievous injustice petitioners ask this Court to redress. The cases cited below are not exhaustive. They could be multiplied many times. They establish certain standards for determining whether an instrument is ambiguous. Once ambiguity is found parol evidence, of course, is admissible.

A recent case by the Supreme Court of Texas is *Lone Star Gas Company v. X-Ray Gas Company*, 164 S. W. (2d) 504. The Supreme Court held that a contract under which a purchaser of natural gas "agrees to receive, in the usual conduct of its business, all of the merchantable gas * * * from the wells * * * on the 290 acres" was ambiguous. The words "in the usual conduct of its business" created a doubt as to whether the obligation of the purchaser was to take all of the gas or only such equitable proportion thereof as was required in purchaser's business. The Court permitted the introduction of parol evidence to show the negotiations between the parties and the practical construction placed by them upon the contract. The Court said at page 508:

> "If the language used in this contract is fairly susceptible of more than one interpretation, it is the duty of a court, in ascertaining the true intention of the parties to consider the subject matter of the contract and the surrounding circumstances existing when such contract was executed (citing authorities). The application of this rule is not to vary or contradict the terms of a contract, but is to aid the Court in ascertaining the true intention of the parties expressed in such contract as they understood the same (citing authorities)."

The Lone Star Gas case is one of the most recent pronouncements by the Supreme Court of Texas. It clearly indicates the liberality of the Court in permitting the introduction of parol evidence where there is any question raised by the instrument itself. In so holding the Supreme Court was merely following many earlier Texas cases, some of which use even stronger language in defining the circumstances under which parol evidence of the real agreement may be admitted to clarify an ambiguous contract.

Thus in *Butler v. Southwest Dairy Products Company*, 146 S. W. (2d) 1036, the Court said at page 1038:

> "However, it has been uniformly held that if an instrument is not clearly unambiguous, the rule should not be permitted to defeat an intention and understanding which can be clearly proved by parol."

In concluding that the trial court should have admitted parol evidence the Court in the Butler case said upon analysis of the contract under consideration:

> "We think that there is room for reasonable doubt as to the intention of the parties * * * and that appellants should be permitted to show said intention by parol evidence."

Among other cases in which the courts of Texas have permitted parol evidence where there was a *reasonable doubt* as to the meaning of the written contract are *Ellisor v. Kennedy*, 128 S. W. (2d) 842 at 844, and *Curry v. Texas Company*, 8 S. W. (2d) 206. In the latter the Court pointed out the danger of excluding parol evidence in the following language at page 212:

> "Putting one of two possible constructions on a term in a contract, without permitting the parties to show which was actually in their minds, is taking the chance of enforcing a contract entirely different from that on which their minds met."

As was said by the Commission of Appeals of Texas in *Hart v. Light and Jones*, 245 S. W. 671 at 674-5:

> "When it becomes necessary to theorize about the intention of the parties as disclosed by the language of a contract, can it be said to be unambiguous?"

In a number of cases the courts of Texas have defined an ambiguous contract as one which contains provisions which are consistent with the theory of either party. *Pyron v. Brownfield*, 238 S. W. 725; *Cleveland v. Cleveland*, 35 S. W. 145 at 148.

The Supreme Court of Texas has said that the exception to the parol evidence rule permitting the introduction of

such evidence to clarify ambiguous contract "is as well settled as is the rule itself." *Magnolia Warehouse and Storage Co. v. Davis and Blackwell*, 195 S. W. 184 at 185.

Many other Texas cases have construed contracts to be ambiguous and permitted the introduction of parol evidence. Some of the agreements considered appear on their face to be less contradictory, confusing and obscure than does the contract here under consideration. Representative cases are *Quanah A & P Railway Company v. Cooper*, 236 S.W. 811. "Through and across Motley County." Parol admitted to show the parties intended that the Railroad be built to a point within the county. "The language is at least sufficient to create a doubt." *Atchinson T. & S. F. Ry. Co. v. Fiedler*, 158 S.W. 265. Release of "all claims" held ambiguous in view of the fact that at another place in the contract the parties referred to a particular accident. Parol evidence admitted to show that a release was intended only of claims arising out of the accident mentioned. *San Jacinto Oil Company v. Fort Worth Light & Power Company*, 93 S. W. 173. A contract was voidable by "failure of oil wells." The wells in question ceased to flow but could have been pumped. The Court held the language ambiguous and admitted evidence to show parties intended a cessation of flow.

See also *Richardson v. Wilson*, 213 S. W. 613; *Smith v. T & N O R. Co.*, 108 S. W. 819; and *American National Insurance Company v. Van Dusen*. 185 S. W. 634.

In a number of cases the Court of Appeals for the Fifth Circuit has followed the Texas rule. See *Navaho Production Corp. v. Panhandle Eastern Pipe Line Co.*, 132 Fed. (2nd) 1, where the trial court found (as in this case) that the language of the contract construed in the light of the circumstances surrounding its execution and the clear intention of the contracting parties evidenced a certain meaning. In holding that the contract was ambiguous and that parol evidence was admissible Judge McCord (who also sat in this case) said at page 3:

> "Where, however, the language is not plain and unambiguous and does not clearly reveal the intention of the parties, but is fairly susceptible of more than one meaning or construction, the Court may properly consider the facts and circumstances surrounding the making of the contract. * * * "

Judge McCord's language is equally applicable to the contract involved in this case.

See also *Hill and Combs v. First National Bank of San Angelo*, 139 Fed. (2nd) 740, where Judge Hutcheson (who also sat in this case) said that he was "unable to say as a matter of law the contract clearly and without ambiguity included the disputed paving." He therefore held that the trial court properly admitted parol evidence and submitted the issue of fact to the jury.

CONCLUSION

As pointed out by both Wigmore and Williston (see Wigmore on Evidence, sec. 2400, and Williston on Contracts,

sec. 361), the parol evidence rule is, notwithstanding its name, a substantive rule of law. Its misapplication in this case has resulted in a contract never agreed to by the parties. It has been erroneously permitted to defeat the real agreement of the parties established by the evidence and found by the trial court.

For these reasons, petitioners pray that certiorari be granted and that the decision of the Court of Appeals be reversed.

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Counsel for Petitioners